In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 479

JOHN HIX AWTRY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 12; R. 258) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 10, 1963. A timely motion for rehearing was denied on June 12, 1964. The petition for a writ of certiorari was filed on September 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims properly found that petitioner's 1948 appointment as a lieutenant colonel in the Army of the United States was "with his own consent" within the meaning of Section 515(d) of the Officer Personnel Act of 1947, 61 Stat. 795, 907.

STATUTES INVOLVED

1. The Joint Resolution of September 22, 1941, 55 Stat. 728, 729, provides in pertinent part:

> . . . during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe. * * *

2. Section 2 of the Act of July 25, 1947, 61 Stat. 449, 451, provides in pertinent part:

> Sec. 2. Notwithstanding the termination date or termination period heretofore provided therefor by law, the following statutory provisions are repealed effective upon the date hereinafter specified, or upon the expiration of the period hereinafter specified, and shall remain in full force and effect until such date or until the expiration of such period. Such statutory provisions are hereby amended accordingly:

a. Repeal effective July 1, 1948:

* * * *

Act of September 22, 1941 (55 Stat. 728, Ch. 414), as amended: . . .

3. Section 515(d) of the Officer Personnel Act of August 7, 1947, 61 Stat. 795, 907, provides:

> To the extent provided from time to time by appropriations for this purpose, any officer of any Reserve component of the Army of the United States may, with his own consent, be ordered to active Federal duty for such length of time as the President may prescribe and in time of a national emergency expressly declared by Congress may be so ordered without his consent. The President may at any time relieve from active duty any Reserve officer who is serving on active duty. Any officer of any Reserve component ordered into or serving on active duty may, with his own consent, be temporarily appointed in a grade in the Army of the United States, either higher or lower than the grade held by him in such Reserve component, and such temporary appointment shall not affect the appointment and grade held by him in his Reserve component.

STATEMENT

This action was brought by petitioner in the Court of Claims to recover, for the period between August 1, 1951 and January 13, 1953,[1] the difference between

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[1] The apparent basis for the court's conclusion that this is the relevant period is the following quotation from petitioner's "Motion for Summary Judgment and Brief in Support There-

the pay of a colonel and that of a lieutenant colonel (which he actually received). Petitioner's theory is that he was not serving under a valid appointment as a lieutenant colonel during the period in question and, therefore, must be deemed to have been serving under his appointment as a colonel in the Officers' Reserve Corps. The relevant facts are undisputed.

Petitioner served on active duty as a commissioned officer in the Army of the United States from September 5, 1942, through March 31, 1953. On April 15, 1944, he was promoted to lieutenant colonel. In February 1948 he was appointed a colonel in the Officers' Reserve Corps while retaining his commission as a lieutenant colonel on active duty. On March 19, 1948, petitioner submitted a request for retention on extended active duty for three years as a lieutenant colonel. In the absence of this request, he would presumably have been separated from the service by June 30, 1948 (Pet. App. 13, 16-17).

When Congress passed the Act of July 25, 1947, 61 Stat. 449, effective July 1, 1948 (p. 2, *supra*) which repealed the Joint Resolution of September 22, 1941, 55 Stat. 728 (p. 2, *supra*) (under which petitioner was originally commissioned and promoted to lieutenant colonel in 1944), the Army sought to protect its officers against the possibility that the repealer would be viewed as terminating all appointments made under the Joint Resolution; it did this by

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of" (p. 3) in the Court of Claims: "The plaintiff recognizes that the recovery of this pay for the period from July 1, 1948 through July 31, 1951 is barred by the 6-year statute of limitations, 28 U.S.C. § 2501."

reappointing affected officers. Pursuant to Section 515(d) of the Officer Personnel Act of August 7, 1947, ch. 512, 61 Stat. 907 (p. 3, *supra*), the Army issued paragraph 7 of Special Order No. 120, June 15, 1948, which provided in pertinent part as follows:

> 7. By direction of the President, paragraph 26b, Special Orders 117, Department of the Army, 1948, is amended to read:
>
> b. DP officers of the Army of the United States who on 30 June 1948 are serving on active duty in temporary grades lower than their permanent grades in * * * the Officers' Reserve Corps * * * are hereby temporarily appointed effective 30 June 1948 under the provisions of section 515 Officer Personnel Act of 1947 in the same temporary grades in which they are serving on 30 June 1948. DP officers so appointed are continued on active duty in new temporary grades. Dates of rank will remain unchanged. New oaths of office for these officers will be administered on 30 June 1948 or as soon thereafter as practicable and forwarded to The Adjutant General. A notation "Aptd. by Par. 26, SO 117 DA 1948 as amended by Par 7 SO 120" will be made on each oath of office form at the left of the signature. * * * Nothing in this order will be construed as making a change to a grade higher or lower than the temporary grade in which the affected personnel are serving on 30 June 1948.

This order was applicable to petitioner; under it, he was given, and he accepted on June 30, 1948, an active duty commission as a lieutenant colonel (Pet. App. 15).

In the court below, petitioner urged that this commission was invalid because it was not "with his own consent" within the meaning of Section 515(d) of the Officer Personnel Act. This contention was rejected by the Court of Claims. Concluding that Section 515(d) did not require the officer to consent expressly to the receipt of a commission, the court ruled that there was no substance to petitioner's "claim that he reasonably believed that he had to accept the new commission, and that the Army offered him no opportunity to refuse it" (Pet. App. 18). Accordingly, on cross-motions for summary judgment, the court granted the government's motion and denied that of petitioner.

ARGUMENT

The decision of the Court of Claims is correct, and it does not in any event present a question of general importance. Review by this Court is not warranted.

On the basis of the undisputed facts, the court properly concluded that petitioner's appointment as a lieutenant colonel met the requirements of Section 515(d) of the Officer Personnel Act (p. 3, *supra*). As noted above, in March 1948 petitioner made an express election to continue on extended active duty as a lieutenant colonel for three additional years. This election was made, as the court below said (Pet.

App. 16), without "any military command or obligation."

It follows that, when petitioner was appointed a lieutenant colonel in June 1948, the appointment was pursuant to petitioner's own written election made just three months earlier—an election which petitioner does not claim was repudiated by him. Moreover, the oath of office which petitioner executed in connection with his new appointment contained instructions that, if the officer did not accept the commission, it should be returned accompanied by a letter indicating the fact of non-acceptance. Petitioner did not follow this course of action; rather, he signed the oath of office and thus indicated his acceptance of the commission.

In these circumstances, petitioner's contention that his June 1948 appointment was without his consent is insubstantial. It is difficult to see how petitioner could have more clearly manifested his agreement to the appointment short of executing a paper which expressly stated his consent. There is, of course, nothing in the Officer Personnel Act which requires that the officer's consent be manifested in any particular manner.

Petitioner's position is not advanced by his claim that his election in March 1948 to continue on extended active duty was made pursuant to Army circulars which had no application to him. The issue here is not whether he was properly called upon to make an election. Rather, it is whether the election manifested a willingness on petitioner's part to continue on active duty as a lieutenant colonel; *viz*,

whether the requisite consent was present.[2] And, even if the March 1948 election were to be disregarded, petitioner would still be confronted with the fact that the written oath of office sent to him in terms gave him the choice of accepting or rejecting the appointment. Having elected to accept it, he can scarcely be heard to insist now that the appointment was without his consent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
Attorney.

October 1964.

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[2] For this reason, it is of no significance that the Army circulars may not have been in evidence. While referring to those circulars, the court below used them only to determine what petitioner was expressing a willingness to do in his written election (which was part of the record).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 745687 272

FILED
OCT 22 1964
JOHN F. DAVIS, CLERK

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Petitioner,

v.

THE UNITED STATES,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

The Brief for the United States in Opposition submitted by the Solicitor General of the United States is amazingly inaccurate. Having recognized in a backhanded way on page 7 of the Opposition that the Army circulars which plainly formed the basis for the Court of Claims decision were not even properly before such court on the motion for summary judgment, the Solicitor General has attempted to justify the decision by demonstrably gross misinterpretations of that evidence which was of record.

On pages 4 and 6 of the Opposition, the statement is made: "The relevant facts are undisputed." Nothing could be farther from the truth.

On pages 4 and 6 of the Opposition, it is alleged that the petitioner in March of 1948 made an express election to continue on extended active duty "as a lieutenant colonel" for three years. There is no basis in the record for this statement. It is false. At the time that the petitioner elected to remain on active duty, he did so only as to time, not grade. He then had two commissions. One was as a colonel in the Officers Reserve Corps, conferred under one act of Congress, and the other was as a lieutenant colonel, Army of the United States, conferred under an earlier act of Congress which would expire June 30, 1948. Petitioner's election for retention made *no* reference to the grade in which he would be retained (R. 101). And the law clearly provided that he could not be retained in a grade lower than that of his grade in the Officers Reserve Corps *without his consent*. Petitioner is not clairvoyant. He could not foresee that the Army would unilaterally retain him on active duty in a grade lower than his Reserve grade.

The assumption of the Solicitor General on page 4 of the Opposition that in the absence of petitioner's request (actually an election for a period of time only) he would have been separated by June 30, 1948, is purely speculative and is not supported by one shred of evidence. See *Miley* v. *Marshall, et al.*, 100 F. Supp. 1012, *affirmed*, 193 F. 2d 712.

The statement of the Solicitor General on page 7 of his Opposition misrepresents. Here he says:

> ". . . . [T]he oath of office which petitioner executed in connection with his new appointment contained instructions that, if the officer did not accept the commission, it should be returned accompanied by a letter indicating the fact of non-acceptance."

From the above the Court might imply that the petitioner was tendered a commission which he had the election to return with a letter indicating the fact of such

non-acceptance. But no commission, or any other scrap of paper, for that matter, was ever presented, offered or tendered to petitioner. The "it" to be returned in line 4 of the above quotation from the Solicitor General is "the commission or notification of appointment" *not* the oath of office. The notification of appointment was contained within Special Order 117. The Order gave no alternatives but compliance. Oaths of office "will be administered," it says (Opp. 5). The Solicitor General is silent on just how compliance with this Order could have been avoided —to say nothing about the absurd proposition that Special Order 117 somehow could have been returned by petitioner.

If this is not sufficient to dispose of the matter, one need only look at the oath form (R. 109) and it is immediately apparent that the *same* form is used for the oath of office administered to civilians who are initially commissioned into the Army. The form *does not* set forth that there is any election on the part of an appointee to accept or not accept. While in paragraph 5 of the fine print, the instructions state "in the case of non-acceptance, the commission or notification of appointment will be returned to the Adjutant General by a letter indicating the fact of non-acceptance," there is no indication that this was directed to the petitioner. The natural assumption is that this part of paragraph 5 is directed to the officer who administers the oath where a person such as a civilian refuses to take the oath. In such case, the commission is returned. That is all that it says.

Still further, it is to be noted that the petitioner merely acknowledged that he had been *appointed* as a lieutenant colonel in the Army of the United States (which had already been given without his consent) and swore to support and defend the Constitution of the United States. How could any active duty soldier refuse to swear to such effect? Rejecting the unwanted appointment is one

thing; refusing to support and defend the Constitution is quite another. It is difficult to conceive how such an oath is sufficient to imply the statutorily required consent of the petitioner to serve in a grade lower than his grade in the Officers Reserve Corps. Particularly is this so when the implication should rise to the level of a legal conclusion in the face of petitioner's affidavit to the contrary.

The petitioner has no objection to the oath, per se. He will take it whenever asked and live by it until the day he dies. It is the appointment in the lower grade to which he objects. Here he should have been given an option; not an order.

On page 6, the Solicitor General says that the petitioner "was given, and he accepted on June 30, 1948, an active duty commission as a lieutenant colonel." On what evidence in the record does the Solicitor General base this statement? The only evidence of the commission was the "Order." Petitioner didn't accept it. He obeyed it.

It is also to be noted that on page 3 of the Opposition, the Solicitor General starts off the Statement to the effect that the action was brought in the Court of Claims to recover for the period between August 1, 1951, and January 13, 1953. Apparently the Solicitor General has not reviewed the pleadings filed in the Court of Claims which plainly show the period for recovery to be from July 1, 1948, to January 13, 1953. As pointed out on page 10 of the petition to this Court, the conclusion by the Court of Claims that part of the claim is barred by the statute of limitations is directly contrary to Section 205 of the Soldiers and Sailors Civil Relief Act, as amended, 54 Stat. 1181, 56 Stat. 770, 50 App. U.S.C. 525 which suspended the statute of limitations during petitioner's period of active duty. Express statutory provisions should not be ignored merely to assuage embarrassment—whatever the source. The Court of

Claims had ample opportunity in the Motion for Rehearing to correct the blunder (R. 253, 254).

On page 6, the Solicitor General states that a question of general importance has not been presented. Laying aside for the moment the denial of due process (which is of serious and general importance by itself), we still have a central question of the Army's circumvention by Special Order of express Congressional language requiring "his consent" to retain a citizen on active duty in lower grade than his permanent commissioned grade. In a practical sense, the Court of Claims decision augments the already considerable arbitrary authority the Government exercises over lives of millions who are serving and will serve on active duty in the armed forces. It is of general importance that the metes and bounds of their rights be clearly defined. And it is particularly of general importance that these rights not be subject to abrogation by sharp practices such as exemplified in the instant case. The countenance of subterfuge to retain Reservists involuntarily in a grade lower than they consented to in violation of the express will of Congress can only adversely affect the morale of the Reserve Forces. Reserve officers were the vast majority of the officers who fought World War II and the Korean Conflict. They are the majority on active duty in the Cold War. And they will probably be so in the next war. Their morale is not only of general importance. It is of vital national importance.

The Court of Claims is constituted to adjudicate disputes between real or juristic persons and the United States. It is a Court constituted under Article III of the Constitution. As with other courts of primary jurisdiction, it is the responsibility of the Court of Claims to find probable facts from the evidence in any given case and apply the law to such facts. The proceedings utilized by the Court of Claims to determine such facts are essentially the same as those utilized by other courts. That is, where facts are in dispute, a hearing is held with